

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF NEW YORK

3  
4 ROBERT F. and APRIL F., )

5 )  
6 Plaintiffs, )

CASE NO. 18-CV-594

7 vs. )

8 NORTH SYRACUSE CENTRAL SCHOOL )

DISTRICT, et al., )

9 Defendants. )  
10

11 **TRANSCRIPT OF PROCEEDINGS**  
12 **BEFORE THE HON. LAWRENCE E. KAHN**  
13 **THURSDAY, JULY 11, 2019**  
14 **ALBANY, NEW YORK**

15 **FOR THE PLAINTIFFS:**

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16 **FOR THE DEFENDANTS:**

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1 (Open court, 11:30 a.m.)

2 THE CLERK: Thursday, July 11, 2019. The case is  
3 Robert F. and April F. versus North Syracuse Central School  
4 District, North Syracuse Board of Education, Annette Speach, and  
5 Dawn Hussein. Thank you. May we have appearances for the  
6 record.

7 MR. DE OLIVEIRA: Good morning, Judge. Carlo de  
8 Oliveira, Cooper Erving & Savage for the plaintiffs.

9 THE COURT: Mr. de Oliveira.

10 MR. DE OLIVEIRA: I also have, Your Honor, my client,  
11 Robert F.

12 MS. REID: Good morning, Judge. Kate Reid, Bond,  
13 Schoeneck & King for the defendant North Syracuse Central School  
14 District.

15 THE COURT: Ms. Reid. Okay. I'm along with my clerks  
16 looking over the many issues here. Some of them are still a bit  
17 confusing, but everyone wants to take care of the child  
18 involved. And I have before me an order to show cause for a  
19 preliminary injunction is what you're seeking.

20 I'll obviously have you speak first and then any  
21 response from the school district, and specifically you can let  
22 us know what specifically you're asking the Court to order or  
23 give the plaintiff in a preliminary injunction, but go ahead.  
24 Let me hear your arguments.

25 MR. DE OLIVEIRA: Good morning, Your Honor. Thank

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1 you. I hope we're able to clarify any questions that the Court  
2 still may have.

3 THE COURT: May have a few.

4 MR. DE OLIVEIRA: We are here before Your Honor  
5 seeking preliminary injunction to enforce the mandate in a  
6 decision of the IHO which was issued back in January 2018.

7 THE COURT: Is that still in effect?

8 MR. DE OLIVEIRA: It's still in effect, Your Honor.  
9 And the reason why it's still in effect --

10 THE COURT: It does not expire ever?

11 MR. DE OLIVEIRA: It doesn't expire because of the  
12 nature of the services found to be necessary for this child's  
13 education, and I think I put in our brief an analogy. What the  
14 school district is arguing is in essence that a student with  
15 disability who needs certain services to be able to function in  
16 a school district, those services are limited per grade. So if  
17 I have to build a ramp in a school district for a child who  
18 needs a ramp because the child is in a wheelchair, that  
19 accommodation will end as soon as the child moves on to  
20 kindergarten. That's absolutely untrue, and I think --

21 THE COURT: I'll hear what you have to say.

22 MR. DE OLIVEIRA: Right. And I think that the IHO's  
23 decision speaks to that fact because the IHO response to that  
24 same argument which was apparently raised during the hearing in  
25 his decision, and the IHO said that there are certain issues.

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1 There are certain violations committed by the school district.  
2 They are prone to be repeated again, and because this child  
3 needs services in order to function in the school district, you  
4 can't just limit those services to preschool.

5 The decision has no time limitation. The decision  
6 actually provides remedial measures to address the violations  
7 that occurred prior to the decision, but he also provides  
8 prospective remedies, which is what we're asking the Court to  
9 enforce. Some of those remedies are that this child, because of  
10 the nature of his disability, he needs certain services. And  
11 the services that the IHO found are necessary for this child's  
12 development is ABA therapy services.

13 THE COURT: In the IHO, does it require how many  
14 hours? I think you were asking for 40 hours of training for ABA  
15 training and the school district says 20 is sufficient, and I  
16 couldn't see if the IHO order specifies.

17 MR. DE OLIVEIRA: The IHO order, if I recall, Your  
18 Honor, the IHO order does not specify how many hours of direct  
19 ABA therapy is necessary, but I think one distinction that needs  
20 to be made, and I think that's what is confusing about this  
21 case, and I recognize that the school district is either raising  
22 this issue due to the lack of misunderstanding of the services  
23 or either, you know, they're doing that intentionally.

24 But ABA services are services that are required for  
25 children, autistic children, and it involves treatment that is

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1 designed to help the child get rid of any bad and harmful  
2 behavior to his learning, but also teach that child how to learn  
3 in a school setting. The ABA services are divided into two  
4 components. There is an intensive component which requires the  
5 child to be pulled out of class and work one on one with a  
6 therapist, and that is very important because that's where the  
7 building block for this child's learning is. It's the  
8 foundation for the child's learning. In that one on one, the  
9 direct contact with the therapist, the therapist will work with  
10 this child one on one to develop his or her independence. So  
11 that is an essential element of ABA therapy.

12 In addition to that, once that child learns those  
13 behaviors in a one-on-one setting, the child is then brought  
14 into what is called the natural setting, which is the classroom.  
15 So when the child is in the natural setting, the classroom,  
16 there is also techniques utilized with this child in a classroom  
17 so the child can respond to the environment and the teachers and  
18 the peers.

19 What the school district is refusing to provide this  
20 child in the case is the building block for this child's  
21 success, which is the direct ABA therapy. This child has not  
22 been provided direct ABA therapy as mandated by the IHO since --  
23 well, ever. What the school district allowed the child to  
24 receive was direct ABA therapy two days a week for an hour and  
25 15 minutes. The IHO said that this child needed at least 45

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1 minutes of direct ABA therapy a day. So one hour, 15 minutes  
2 for two days of direct ABA therapy, but that only lasted for a  
3 few months because in October 2018, and we have all the  
4 affidavits provided by the professionals in charge of providing  
5 those services show that the school district told them that they  
6 did not want this child to be pulled out of class anymore for  
7 these services.

8 So in essence, the school district is telling the  
9 parents, "We're not going to allow your child to build the  
10 building block that is necessary for his learning." And the  
11 reasons are set forth in my client's affidavit. The reasons  
12 range from the union is against having another professional in a  
13 classroom. We just can't contract with a BCA, which is a typo  
14 in the IHO decision. So the rationale given by the school  
15 district not to provide those services has no basis in law or  
16 the fact.

17 THE COURT: Am I correct that the IHO requires ABA  
18 therapy to be given by someone with a BCBA or LBA certification  
19 and Amanda only has an RBT, the one who's doing it?

20 MR. DE OLIVEIRA: That is correct, Your Honor.

21 THE COURT: Do you object to that?

22 MR. DE OLIVEIRA: My client is here. Yes. No. We  
23 don't object to the provision of direct ABA services by Amanda  
24 Wise, which is the RBT.

25 THE COURT: That's okay with you?

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1 MR. DE OLIVEIRA: That is okay with the parents.

2 THE COURT: Do you agree that Amanda Wise has  
3 performed the ABA therapy that's required by the IHO or the IEP?

4 MR. DE OLIVEIRA: Say that again, Your Honor.

5 THE COURT: Do you agree to have Amanda Wise perform  
6 the ABA therapy required by the IEP or the IHO? You agree with  
7 that?

8 MR. DE OLIVEIRA: My clients would agree.

9 THE COURT: To have Amanda Wise perform it.

10 MR. DE OLIVEIRA: To have Amanda Wise perform both,  
11 and that's the important distinction. The natural environment  
12 ABA therapy, but also the most important portion of our request  
13 today, Your Honor, is that the school be ordered to allow direct  
14 ABA therapy. And to the extent that the Court is willing to  
15 order the school to provide those services as mandated by the  
16 IHO, my clients would not object if those services are provided  
17 by Amanda Wise.

18 THE COURT: You want in-class ABA therapy?

19 MR. DE OLIVEIRA: In-class ABA therapy is different  
20 than direct ABA therapy. Amanda Wise is currently in the  
21 classroom utilizing techniques of ABA therapy, but as I  
22 explained earlier, those are reinforcement techniques after the  
23 child learns the foundation in a direct setting.

24 THE COURT: So you object to her doing that?

25 MR. DE OLIVEIRA: No. We do not object to her

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1 continuing to do ABA therapy in the classroom. What we're  
2 asking the district to do is allow Amanda Wise to pull this  
3 child out of the classroom as well to provide direct ABA  
4 therapy.

5 THE COURT: And they're not allowing that direct  
6 therapy?

7 MR. DE OLIVEIRA: They have not allowed Amanda Wise to  
8 do so. She has testified both in her affidavit and at a  
9 deposition that those services have not been provided. We have  
10 affidavits from the previous LBA who initiated the services back  
11 in the fall of 2018 in which she says, "I was allowed to do  
12 direct ABA therapy for a few months, and then the school  
13 district asked us to pull out, did not allow myself to continue  
14 to do the direct ABA therapy." And without direct ABA therapy,  
15 this child's learning would not materialize because we're not  
16 building the foundations for the learning.

17 THE COURT: Okay. Are you requesting Amanda Wise to  
18 perform pull-out ABA therapy?

19 MR. DE OLIVEIRA: We are requesting that the district  
20 allows this child to be pulled out of classroom to receive  
21 direct ABA therapy by any professional capable. To the extent  
22 Amanda Wise is still available to provide those services, we  
23 don't have an objection to it. So long as direct ABA therapy is  
24 provided, we are okay with that.

25 THE COURT: Is there ABA training required for the



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1 parents?

2 MR. DE OLIVEIRA: That is another issue that we raise  
3 in our preliminary injunction, that the IHO clearly stated that  
4 the school district was required to provide ABA training for the  
5 parents. And the reason for that is that once the child learns  
6 those foundation skills in a direct ABA setting, both in school  
7 and at home, there has to be continuity. There has to be a way  
8 for the parents to interact with this child in a way that does  
9 not cause regression.

10 THE COURT: Are you saying that the defendant school  
11 district is not allowing that?

12 MR. DE OLIVEIRA: The defendant school district has  
13 not provided the services.

14 THE COURT: And you did request them?

15 MR. DE OLIVEIRA: We have requested. IHO ordered  
16 that. The parents have requested, and the school district has  
17 yet to provide them. They provided for two months out of the 14  
18 months since the IHO decision.

19 THE COURT: Speaking about the IHO, does that expire  
20 anytime? How long does that apply?

21 MR. DE OLIVEIRA: Our position, Your Honor, is that  
22 that will continue throughout this child's academic career.

23 THE COURT: It could be 10, 15 years? Does it ever  
24 have to be renewed, which might be a pain in the neck to do  
25 every year, but how does it work? What's the requirement?

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1 MR. DE OLIVEIRA: I think that would be an answer for  
2 the professionals working with the child. If you look, the  
3 record of this child right now is that the child has shown  
4 regression because of the lack of treatment. To the extent that  
5 this child can reach a limit, a threshold that would allow this  
6 child to function in class, then I believe that that would be  
7 the end of the services. But until we reach that point, I think  
8 the IHO decision is pretty clear. This child needs the services  
9 in order to be able to function in school and to develop  
10 academically, and without those services, the child cannot do  
11 it.

12 THE COURT: So you're saying the IHO order has no  
13 expiration date? It just continues until when?

14 MR. DE OLIVEIRA: Until a professional working with  
15 the child, because what the professional, the LBA provides  
16 reports on the child's development. To the extent that the  
17 IHO -- LBA working with this child still thinks that this child  
18 needs those treatments.

19 THE COURT: You say LBA. She's not an LBA.

20 MR. DE OLIVEIRA: The LBA, the RBT. If that's what  
21 the Court would order the district to do, as I said, we don't  
22 have an objection to it. But what I'm saying is the  
23 professional working with this child who is recording the data  
24 and evaluating the progress of this child and his function and  
25 his ability to communicate, to the extent that that professional

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1 believes that services are still necessary, I believe that the  
2 IHO decision provides for that. The IHO decision never puts in  
3 a deadline on the services. He said this child needs those  
4 services in order to progress academically. To the extent the  
5 child is still progressing academically, I think the services  
6 are still needed.

7 Again I analogize to a child in a wheelchair. When do  
8 you stop? When do you stop providing accessibility for a child  
9 with that type of disability? It's no different here. It's  
10 just a different type of disability, except that if this child  
11 is not provided those services early on, which our position is  
12 it's already not happening, the window of opportunity for this  
13 child to reach that maximum point, that threshold where he or  
14 she will be able to -- in this case he will be able to function  
15 independently is closing.

16 THE COURT: If the parents move to a different school  
17 district, do they have to get a new IHO, or does that go  
18 anywhere all the time?

19 MR. DE OLIVEIRA: Your Honor, the records from one  
20 school transfers to another school when the child has the type  
21 of disability. And we would hope that once the -- if that ever  
22 happens, that if this child is moved to a different school, upon  
23 reviewing the records provided by the North Syracuse Central  
24 School District, that they will provide those services because  
25 it's something that --

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1 THE COURT: In other words, the IHO is still in  
2 effect?

3 MR. DE OLIVEIRA: I believe so, Your Honor. I believe  
4 so.

5 THE COURT: Okay.

6 MR. DE OLIVEIRA: And the one other point that we  
7 raise in our preliminary injunction that the school district has  
8 failed to comply with. We talked about the parents' training.  
9 The school district has also failed to provide ABA training for  
10 all the staff working with this child. And again, why is this  
11 necessary? Because if this child, as the affidavits provided by  
12 the school witnesses stated, if this child goes out for physical  
13 therapy, for speech therapy and the speech therapist is not  
14 knowledgeable of ABA methodology, there's not going to be  
15 progress on this child's speech. He can't communicate.

16 Same thing with physical education. If this child  
17 goes to physical education and the physical education teacher is  
18 not able to understand that the child has both communication and  
19 motor skills limitations and how to address those when a child  
20 needs ABA therapy services, if that teacher does not have that  
21 training, the child is not going to succeed, going to have  
22 regression.

23 And the IHO recognized that based on the testimony,  
24 the expert testimony provided at the hearing. And he found that  
25 it is necessary that all staff members working with this child

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1 receives this type of training. The TA working with this child,  
2 the IHO ordered that the TA working with the child receive  
3 training in the delivery of ABA therapy, which is what Amanda  
4 Wise is doing.

5 THE COURT: While the hearing officer has no  
6 expiration date, he issues an order, the IEP does expire; am I  
7 correct?

8 MR. DE OLIVEIRA: Yes.

9 THE COURT: That is the education plan, and didn't  
10 that expire a month ago?

11 MR. DE OLIVEIRA: Right.

12 THE COURT: What happens then?

13 MR. DE OLIVEIRA: That's a distinction, an important  
14 distinction that we need to make as well. We have an order by  
15 an IHO involving what services this child needs as a result of  
16 his or her disability. That's a mandate. An IEP is a document  
17 that is prepared by a committee of special education with the  
18 teachers in the school district and the parent. And that  
19 changes every year because the child moves grades. There are  
20 different services needed. But it doesn't erase the mandate  
21 that this child needs certain services in order to progress  
22 academically.

23 I keep going back to the wheelchair example. An IEP  
24 will change for a child with disability every grade.

25 THE COURT: It could change if the child began to walk

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1 obviously.

2 MR. DE OLIVEIRA: If the child begins to walk, it's  
3 not an IEP issue. It's a -- do as you have to provide  
4 accommodation for that disability. It's different. An IEP is  
5 so the child receives the services from school for academic  
6 purposes.

7 THE COURT: So there's got to be a new one issued  
8 shortly, I gather?

9 MR. DE OLIVEIRA: For an IEP, an IEP changes depending  
10 on the progress of the child in the school year. As you can see  
11 from this record, we have three IEPs drafted between September  
12 2018 and May 2019, three IEPs drafted, none of which have been  
13 fully agreed by the parents. But because the committee involves  
14 teachers, the majority of the teachers, they make the decisions  
15 even though the parents disagree with them. That's the problem.

16 THE COURT: Is that unusual? In other words, if  
17 there's an IEP, does it have to have the consent of the parents?

18 MR. DE OLIVEIRA: Absolutely. That's what the  
19 regulations say. You have to have consent of the parent. But  
20 what is happening in the school district as you see by the IEP  
21 is that they have been playing games with the language of the  
22 IEP. They have never put in the IEP that this child needs  
23 direct ABA therapy services as the IHO ordered, and my client is  
24 here. He can explain if the Court has any factual --

25 THE COURT: Does the IHO order not agree with the IEP

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1 or change it?

2 MR. DE OLIVEIRA: The IHO specifically ordered the  
3 school district to revise the IEP to incorporate the mandates of  
4 his order.

5 THE COURT: Did they do that?

6 MR. DE OLIVEIRA: They did not do that.

7 THE COURT: I'll hear from them.

8 MR. DE OLIVEIRA: They have not done that. So the  
9 reason we are here for a preliminary injunction, Your Honor, is  
10 that we have -- my clients have tried every other possible  
11 avenue. We have gone to an IHO. We have gone to Department of  
12 Education twice.

13 THE COURT: You don't like to be here, but I still  
14 want you to spell out what specifically are you asking the Court  
15 to enjoin or to order the school district to do or not do.

16 MR. DE OLIVEIRA: We're asking the Court to in essence  
17 maintain the status quo. In our brief, we cited to several  
18 cases including a case from the Northern District, Kantak case  
19 in which the Court ordered a school district to comply with an  
20 IHO's decision. We're asking this Court to look at the IHO  
21 decision and tell the school district you must comply with this  
22 IHO decision immediately.

23 THE COURT: You're saying they're not doing that?

24 MR. DE OLIVEIRA: They have not done so, Your Honor.

25 THE COURT: In what way are they not doing it?

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1 MR. DE OLIVEIRA: In what way?

2 THE COURT: Specifically.

3 MR. DE OLIVEIRA: They have not provided direct ABA  
4 therapy for this child as ordered by the IHO. They have not  
5 trained a teaching assistant which they provided as Ms. Harvey.

6 THE COURT: Ms. Harvey.

7 MR. DE OLIVEIRA: Ms. Harvey. They have not provided  
8 this teaching assistant training on the delivery of ABA therapy.

9 THE COURT: They claim they provided 20 hours of  
10 training. You say it should be 40 hours.

11 MR. DE OLIVEIRA: The training is spelled out in  
12 Ms. Wise's affidavit. The training requires 40 hours of  
13 training. And in fact, Your Honor, last night I saw an email  
14 that was provided by Ms. Reid in support of her opposition. I  
15 must point out the record submitted by AAPSA to defendants are  
16 much more comprehensive than those two emails and includes  
17 documentation that show that the school district was on notice  
18 that the training needed for the TA included RBT training, which  
19 is what Amanda Wise is trained to do. And Amanda Wise was only  
20 assigned that job so that the school district would have time to  
21 provide that training to Ms. Harvey, which was never done.

22 If the Court would entertain, allow me to introduce  
23 this document as evidence in this hearing.

24 THE COURT: I want to give some time to Ms. Reid. We  
25 don't have much time left.



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1 MS. REID: Thank you, Judge.

2 MR. DE OLIVEIRA: Right. I have a copy for Ms. Reid.

3 So this, Your Honor, it's an email exchange between  
4 Kathy Wheeler, the principal, and our clients.

5 THE COURT: Right.

6 MR. DE OLIVEIRA: And in the email, it says that our  
7 clients have agreed to change the IEP to include -- it's on the  
8 second page, Judge. Ms. Wheeler stated that the IEP will be  
9 changed to reflect that G.F. will be provided one hour and 15  
10 minutes of direct ABA therapy daily four days a week by a  
11 licensed RBT therapist under contract by the district. If you  
12 review all the IEPs provided to the Court in this case, this  
13 language was never adopted in any of the IEPs. There was never  
14 a reference to direct ABA therapy.

15 THE COURT: Do you want that?

16 MR. DE OLIVEIRA: That's what we want.

17 THE COURT: That's what they're offering?

18 MR. DE OLIVEIRA: That's what they told the parents  
19 they would do, but they never did.

20 THE COURT: When was that sent?

21 MR. DE OLIVEIRA: I'm sorry, Judge?

22 THE COURT: October 11, 2018?

23 MR. DE OLIVEIRA: Right, right.

24 THE COURT: Okay. I'd like to hear Ms. Reid on that  
25 too and on everything else. She'll have ten minutes. I'd like

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1 to get to her now and hear what she has to say. I've read all  
2 your submissions, and after this is over, if either side wants  
3 an extra few days to submit something else that came up new  
4 here, but I think I have a lot before us and we can get a  
5 decision out.

6 But Ms. Reid, go ahead.

7 MS. REID: Thank you so much, Judge.

8 So before I get started with the argument, I do want  
9 to state you began your remarks this morning by stating we all  
10 want what's best for this child. The district unequivocally  
11 wants what is best for this child. And I think what you will  
12 see when you review all the papers that have been submitted in  
13 this file so far is that this is the epitome of no good deed  
14 goes unpunished. This is a situation where the district has  
15 responded to the parents' preferences, the parents' requests to  
16 do precisely what the parent has asked, and now they're being  
17 hauled into federal court.

18 THE COURT: You're saying the IHO agreed with you or  
19 no?

20 MS. REID: No. The IHO disagreed with the district in  
21 the first instance.

22 THE COURT: Right.

23 MS. REID: Since that time, the district has done  
24 everything possible.

25 THE COURT: To comply with the IHO?

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1 MS. REID: To comply with the IHO, to amend the  
2 child's IEP, reflect the preferences advanced by the parent, and  
3 the parent is now using something in fact that they requested  
4 from the district in the first instance against the district.

5 Last evening, I filed a declaration with an attachment  
6 A which reflects correspondence from the parent Ms. F. to AAPSA  
7 from October 2018 in which Ms. F. said, "I would prefer that  
8 these services be delivered in the classroom as the day goes  
9 on," or the precise quote was "on the fly" was the quote.  
10 Pushed into the classroom, in other words. That is precisely  
11 what she said.

12 She said I've been working hard to get the services  
13 delivered that way. The district finally has agreed with me  
14 thanks to the tireless advocacy of Kathy Wheeler, who is the  
15 building principal. They're going to do it this way. They're  
16 agreeable to Amanda doing it on the fly, quote-unquote. To  
17 which AAPSA replied, "That's great because that's clinically  
18 indicated and that's better anyway."

19 That is what we're here -- this is what they're  
20 complaining about here today. They're not complaining about the  
21 actual services that are being delivered because, Your Honor, if  
22 you review the deposition of Ms. Wise, which was submitted as --

23 THE COURT: Just yesterday.

24 MS. REID: Correct, yes. If you look at that  
25 deposition testimony, it is crystal clear. Ms. Wise begins her

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1 testimony by explaining what is ABA therapy. That was the  
2 question I asked her. Her response was it consists of certain  
3 techniques, which include DTTs, NETs, prompting, manding,  
4 natural environment, and peer prompting I believe were the  
5 examples she gave. I asked her what she is doing with G.F.  
6 today -- well, not today, but before the school year ended in  
7 the classroom when she is delivering services to him in the  
8 classroom. She proceeded to enumerate precisely those  
9 techniques.

10 THE COURT: I read that. You heard what the  
11 plaintiffs are specifically asking me to put in a preliminary  
12 order. You heard that?

13 MS. REID: I did indeed, Your Honor, yes.

14 THE COURT: You did. Is there any part of that that  
15 you disagree with?

16 MS. REID: I disagree with all of it, Your Honor.

17 THE COURT: In what way particularly?

18 MS. REID: Principally, Your Honor, because opposing  
19 counsel's interpretation of the IDEA is creative, but quite  
20 frankly, it is turning the IDEA on its head. An IHO order by  
21 definition, by well-established law of this circuit is binding  
22 on the IEP that it modifies. I cited the MC case from the  
23 Second Circuit. I cited as well a Southern District case, which  
24 is the student X case, both of which make that very point.

25 The fact that an IHO orders an amendment to an IEP is

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1 binding on that school year alone, and the reason for that is  
2 because legally the district must reconvene its committee on  
3 special education and it must prepare a new IEP for the student  
4 in every subsequent school year. If the parent disagrees with  
5 the IEP that's created, it must recommence due process. It must  
6 exhaust. They must exhaust their administrative remedies.

7 And that is precisely what happened in the MC case and  
8 in the student X case. The parent obtained a favorable decision  
9 of the IHO saying actually in the student X case, Your Honor,  
10 deliver ABA therapy. The student needs ABA therapy.  
11 Thereafter, eventually the district said, "We don't believe the  
12 student requires ABA therapy." The parent tried to assert that  
13 the finding of the IHO in a prior school year was binding on  
14 subsequent school years, and the Court rejected that based on  
15 the well-established law of the circuit.

16 THE COURT: You're saying you're not bound by the IHO,  
17 the hearing officer's findings because it expired?

18 MS. REID: Correct. It expired by operation of law,  
19 sir.

20 THE COURT: When did it expire? The end of the school  
21 year?

22 MS. REID: Well, certain portions of it. I think we  
23 have to parse what's in the IHO order because there are certain  
24 components I do not dispute did continue.

25 THE COURT: So you're saying it expires in part, not

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1 altogether?

2 MS. REID: It expires in part, correct, Your Honor.

3 THE COURT: Who decides what part expires or not? Me?

4 MS. REID: The Second Circuit, sir, has clearly said  
5 that amendments, that changes to an IEP ordered by an IHO are  
6 binding in that school year. So if we look at the IHO order, we  
7 can separate the relief that was ordered into two categories.  
8 We have compensatory education. Under well-established law of  
9 this circuit, compensatory education is intended to remedy past  
10 denials of FAPE, free appropriate public education. That was to  
11 remedy the parents -- to address the parents' assertion which  
12 was founded by the IHO that there had been a denial of FAPE in  
13 prior school years while G.F. was in preschool. That was the  
14 relief ordered.

15 THE COURT: Against you?

16 MS. REID: Against my client, correct, sir. However,  
17 the IHO also ordered prospective changes to G.F.'s IEP, but the  
18 order itself is very clear. Amend his IEP to reflect X, Y, and  
19 Z.

20 THE COURT: You're saying the prospective findings of  
21 the IHO is not binding on you?

22 MS. REID: It became -- it was binding for the  
23 duration of the school year. However, when in June of 2018 the  
24 CSE reconvened, prepared a new IEP for G.F., that IEP by  
25 operation of law, and based on the cases we cited in our brief,

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1 superseded the past IEP and gave rise to a new cause of action  
2 against the district for that school year.

3 THE COURT: They've got to come back every year?

4 MS. REID: Correct.

5 THE COURT: And the IHO's order is ended?

6 MS. REID: The IHO's order is ended, Your Honor,  
7 except for that compensatory education piece because the IHO put  
8 a date of termination on that component of the order. The IHO  
9 said that bank of compensatory education will be available until  
10 I believe it's January 1, 2020. So at that point, that  
11 prospective of the order would expire. The provisions that  
12 amended the IEP expire when the IEP expired.

13 And as I stated, the case law is clear if the parents  
14 have a dispute about a subsequent school year, they need to go  
15 to due process and exhaust those claims. There is no reason and  
16 there is no legal basis to be here in this court directly  
17 disputing the sufficiency of these ABA services. That in the  
18 first instance is the province of an impartial hearing officer.

19 And you can see based on the minutia of precisely how  
20 these services are being delivered, whether it's push-in,  
21 pull-out, that should be being adjudicated in an impartial  
22 hearing, Your Honor. That should not be here in federal court  
23 in the first instance in front of you because we go back to what  
24 is this action about. This is a claim for damages arising out  
25 of violations of the Rehabilitation Act of 1973 when G.F. was in

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1 preschool.

2 THE COURT: I still have to decide that or has that  
3 worked out?

4 MS. REID: I'm sorry, Your Honor?

5 THE COURT: You're talking about the damages.

6 MS. REID: The damages claim for preschool is still  
7 before you because that claim was permitted to continue.

8 THE COURT: That's before me?

9 MS. REID: Correct.

10 THE COURT: Is that in this proceeding right now?

11 MS. REID: There's no basis for that to be raised in  
12 this particular motion because this motion is a motion for  
13 preliminary injunction.

14 THE COURT: Right.

15 MS. REID: The complaint does not seek injunctive  
16 relief. We cited a number of cases in our brief that state  
17 where the fundamental cause of action is one for money damages,  
18 there is no basis for preliminary injunctive relief. They're  
19 seeking money damages for the identical conduct for which they  
20 pursued educational relief under the IDEA. That's what they  
21 advanced to the impartial hearing.

22 Now, the Court said the fact that they advanced those  
23 same claims in an impartial hearing does not foreclose them from  
24 coming to federal court under Section 504. But it certainly  
25 does not mean that they can now bootstrap claims from this



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1 school year and subsequent school years onto that claim for  
2 damages from prior school years because we go back to the  
3 Supreme Court's direction in Fry.

4 The Supreme Court direction in Fry is: Is this a  
5 claim that is uniquely brought by a disabled student and their  
6 parent against a school district based on the rights of a  
7 disabled student? If that's the case, that claim must be  
8 exhausted. This issue about Amanda Wise has not been exhausted.  
9 There's absolutely no exhaustion of that point.

10 THE COURT: I'll give you some time to reply to that.

11 MS. REID: Before you turn, can I just address the  
12 substance of the actual merits of the Wise issue?

13 THE COURT: Go ahead.

14 MS. REID: Because I think this does bear repeating,  
15 Your Honor. During her deposition, Ms. Wise at no point could  
16 identify any restriction that any individual in the school  
17 district placed on her. In fact, she testified that she hasn't  
18 spoken to anyone in the school district about wanting to deliver  
19 these services as a push-in service.

20 And furthermore, as the documentation that we  
21 submitted last night suggests, this was a -- the decision to  
22 provide the services on a push-in basis was based on a request  
23 from the parent in the first instance. That was not based on  
24 the district initiating services in that way. So really what  
25 they're objecting to is not the nature of the services. It's

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1 where the services are being delivered. The IEP is silent on  
2 that point.

3 And if I could address one other point raised by my  
4 opponent as well is simply factually incorrect, and that is the  
5 assertion that the district never reconvened CSE to adopt an IEP  
6 that was consistent with the IHO's order. That is flatly  
7 refuted by the record.

8 Exhibit 7 of the DiFlorio affidavit that we already  
9 filed in our opposition contains the IEP that was formulated in  
10 response to the IHO's order, and it hits every point in that  
11 decision. There is nothing that is omitted. What they are  
12 disputing is whether that IHO order continued into the school  
13 year, and the law is crystal clear it didn't, Your Honor.

14 THE COURT: You're saying it expired?

15 MS. REID: It expired. It did.

16 THE COURT: And his order expired?

17 MS. REID: Except for those portions pertaining to the  
18 compensatory services, correct.

19 MR. DE OLIVEIRA: Your Honor, the legal arguments  
20 involving the IDEA versus the Rehabilitation Act has been fully  
21 briefed by the Court. In fact, I think it's law of the case  
22 that Your Honor already decided. So I'm not going to bore the  
23 Court with that.

24 I just want to point out one issue that Ms. Reid  
25 argued with respect to the email that she attached to her

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1 affidavit, and I actually think that that goes to exactly what  
2 we're talking about because in the email, April F., the mother  
3 of the child and my client, specifically says it's best if  
4 Amanda did direct ABA therapy on the fly throughout the day when  
5 she's already there.

6 So what we're claiming is that we even agreed to allow  
7 Amanda Wise who is not an LBA or BCBA to provide direct ABA  
8 therapy service to the child during the day, but it never  
9 happened. The defendants cannot rebut that. They cannot  
10 provide any evidence that any direct ABA therapy was provided to  
11 this child after October 2018. Amanda Wise testified with  
12 respect to that. Angela Saturno testified with respect to that.  
13 Dr. Friga testified with respect to that, and they have no way  
14 of proving otherwise.

15 One other issue that I want to point out, Your Honor,  
16 is by the way, Amanda Wise did testify about how her work was  
17 restricted in her affidavit, and Your Honor, it's provided to  
18 the Court. The Court can read it, but the parent is here.  
19 Mr. F. is here. So to the extent the Court has any questions  
20 about any factual issues involving what the parents in fact told  
21 the school district or what the parents in fact asked the school  
22 district to do or what the parents in fact challenged from the  
23 school district, he is right here, Your Honor.

24 THE COURT: At this point, I'm just going to go by the  
25 papers that are submitted. I don't think I have to do that at

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1 this point.

2 Were you going to add something?

3 MS. REID: I was just going to state, Your Honor, that  
4 the order was changed to reflect that this was not an  
5 evidentiary hearing. As a result, I do not have any witnesses  
6 here, and I would strenuously object.

7 THE COURT: I'm not going to do that. Look. There's  
8 an awful lot of interesting issues here. The important thing is  
9 to take care of the child. We're all trying to do that. I'm  
10 not sure the school isn't trying hard to do what it can. You  
11 both disagree.

12 It's interesting if the parents themselves want  
13 something for a child and the school district disagrees, and  
14 then I've got to look at the IEP and the IHO order. But it  
15 seems that the wishes of the parents is a factor to be  
16 considered. But I'm going to look at this all and check the  
17 law. That's the key thing, and I'll try to get a decision out  
18 pretty quickly.

19 Yes?

20 MS. REID: Just one final word on that, sir, because I  
21 didn't speak to that assertion. The assertion of my opponent  
22 was that the parent must agree with an IEP. That is also  
23 completely refuted by all the law of the circuit. The law is  
24 crystal clear. The parent is a mandatory participant at the  
25 CSE, but the Second Circuit has held that being a participant

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1 means having the right to participate in the meeting and to  
2 share your views. It does not mean the right to dictate the  
3 IEP. So to the extent that Mr. De Oliveira said if the parent  
4 doesn't agree, that doesn't permit the IEP to go forward, that's  
5 completely contrary to black letter law.

6 THE COURT: You disagree with that?

7 MR. DE OLIVEIRA: Your Honor, no. The point I made  
8 was that the parents are going against the school district. The  
9 school district brings all the teachers into the IEP, and they  
10 eventually make the decisions irrespective of what the parents  
11 are saying. Point being is what is in the IEP is not  
12 necessarily what the parents have agreed to, and they have  
13 vocally expressed that over and over, and the record will show  
14 that.

15 Two more points, Your Honor, and I apologize.  
16 Ms. Reid mentioned Exhibit 7, the DiFlorio affidavit, which  
17 includes IEP from I believe June 2018. Question is: Was the  
18 IEP ever implemented? In our position, it was not for the  
19 reasons set forth in our affidavit.

20 And then finally, with respect to the IHO's order  
21 expiring, the Education Department, New York State Education  
22 Department disagreed. The Education Department has issued a  
23 decision in 2018 and 2019 finding that the school district was  
24 still in violation of the IHO's order.

25 THE COURT: I'll be looking into all of that and try

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1 to get a decision out pretty quickly. I thank you for all of  
2 your input.

3 THE CLERK: All rise. Court is adjourned.

4 (The matter adjourned at 12:09 p.m.)

5  
6 CERTIFICATION OF OFFICIAL REPORTER

7  
8  
9 I, JACQUELINE STROFFOLINO, RPR, Official Court Reporter,  
10 in and for the United States District Court for the Northern  
11 District of New York, do hereby certify that pursuant to Section  
12 753, Title 28, United States Code, that the foregoing is a true  
13 and correct transcript of the stenographically reported  
14 proceedings held in the above-entitled matter and that the  
15 transcript page format is in conformance with the regulations of  
16 the Judicial Conference of the United States.

17  
18 Dated this 18th day of July, 2019.

19  
20 /s/ JACQUELINE STROFFOLINO

21 JACQUELINE STROFFOLINO, RPR

22 FEDERAL OFFICIAL COURT REPORTER

23  
24  
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**UNITED STATES DISTRICT COURT - NDNY**